IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-906

OTTER TAIL POWER COMPANY,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION and ALEXANDRIA, BARNESVILLE, BENSON, DETROIT LAKES, HENNING, LAKE PARK, ORTONVILLE and WARREN, MINNESOTA, and BIG STONE CITY, SOUTH DAKOTA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Otter Tail Power Company (Otter Tail), prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on September 8, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A, *infra*, pp. A-1 through A-20)[1] is reported at 583 F.2d 399.

The Orders of the Federal Power Commission (now the Federal Energy Regulatory Commission) which were reviewed and affirmed by the United States Court of Appeals for the Eighth Circuit are as follows:

"Order Accepting for Filing and Suspending Certain Proposed Rate Schedule Filings, Establishing Procedures, Consolidating Proceedings and Granting Interventions," issued December 28, 1976, FPC Docket Nos. ER77-5, ER77-6, ER77-7 and E-9544. (The order is unreported; it appears in the separate Appendix, R. 489 through R. 500.)[2]

"Order Denying in Part and Granting in Part Rehearing," issued June 2, 1977, FPC Docket Nos. ER77-5, ER77-6, ER77-7, E-9544 and E-8152. (This Order is unreported; it appears in the separate Appendix, R. 618 through 629.)

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[1] The portion of the Appendix that is bound with this Petition is designated herein as "App. A (B or C), followed by "infra" and the page reference.

[2] The Orders of the Federal Power Commission under review are printed in a Separate Appendix containing Appendices D and E. Appendix D (Order issued December 28, 1976) is designated D-1 [R. 489] through D-12 [R. 500]. Appendix E (Order issued June 2, 1977) is designated E-1 [R. 618] through E-15 [R. 629].

In addition, there has been lodged with the Clerk of this Court 40 copies of the portion of the Record printed as a joint Appendix for the Court of Appeals below. Extra copies were printed pursuant to stipulation of the parties for possible use in subsequent proceedings in this Court. This Appendix bears the caption of the case in the United States Court of Appeals for the Eighth Circuit. References to the Record as printed in the joint Appendix for the court of appeals below are designated herein as "R.", followed by the page number.

JURISDICTION

The Judgment of the Court of Appeals (Appendix A, *infra*, p. A-21) is dated and was entered on the 8th day of September, 1978.

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether the Commission properly classified the rate schedule, which was filed by Otter Tail to provide service mandated by the antitrust judgment approved by this Court in *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), as a *change in rates* under §205(d) and (e) of the Federal Power Act, 16 USC 824d(d) and (e), rather than as an initial rate for a new type of service under §206(a) of the Act, 16 USC 824e(a), where the effect of the Commission's classification is to compel Otter Tail to furnish service to municipal electric power systems at non-compensatory rates, contrary to the antitrust judgment.

II

Whether the Commission's action, in accepting the rate filed by Otter Tail as a change in rates, was proper where it directly conflicts with the Commission's previous action in accepting Otter Tail's filing of a substantially identical rate for service to another municipality (Elbow Lake) as an *initial* rate for a new type of service.

III

Whether the action of the Commission and approval by the Court of Appeals for the Eighth Circuit is in error as in con-

flict with the rules of law announced and applied in another court of appeals in *Town of Norwood, Mass. v. FERC*, —— F.2d ——, D.C. Cir. No. 77-1326 (October 23, 1978) and *Boroughs of Chambersburg, et al. v. FERC*, 580 F.2d 573 (D.C. Cir. 1978), and in *Boston Edison Co. v. FPC*, 557 F.2d 845 (D.C. Cir. 1977); *cert. denied*, —— U.S. ——, 54 L.Ed.2d 314 (1977).

STATUTES AND REGULATIONS INVOLVED

The review in the Court of Appeals was pursuant to §313(b) of the Federal Power Act, 16 USC 825*l*(b).

Sections 205 and 206 of the Federal Power Act, 16 USC 824d and 824e, which are involved in the questions presented for review, are reproduced in Appendix B, *infra*, pp. B-1 through B-4.

The relevant regulations of the Commission under these sections of the Act relating to the questions presented—§§35.1(b) and (c), 35.12, 35.13, 35.15, 36.2(e), (f) and (g), and 131.53, 18 CFR §§35.1(b) and (c), 35.12, 35.13, 35.15, 36.2(e), (f) and (g), and 131.53 are set forth in Appendix C, *infra*, pp. C-1 through C-10.

STATEMENT OF THE CASE

This petition involves a review of two Orders of the Federal Power Commission (FPC)[3] issued December 28, 1976 (R. 489-500), and June 2, 1977 (R. 618-629), in several dockets that were consolidated before the Commission. The first of these

[3] Effective October 1, 1977, the Federal Power Commission became the Federal Energy Regulatory Commission (FERC), an independent regulatory agency within the Department of Energy, Sections 401, 402, 406, Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, 42 USC Sections 7171, 7172, 7176.

Orders (R. 489-500) was issued on Otter Tail's October 4, 1976, tender for filing of its "Initial Rate Schedule Providing for a Compensatory Rate for Firm Wheeling (Transmission) Service, Applicable to Municipalities" and related filings of notices of termination of expiring arrangements for excess capacity wheeling service under voluntarily negotiated contracts. The second of these Orders (R. 618-629) was issued on Otter Tail's Petition for Rehearing (R. 508-583).

Otter Tail's filings were made to provide a compensatory rate for the new type of service mandated by the judgment approved by this Court in the Otter Tail antitrust case.[4] The rate was to apply to all municipal electric systems in Otter Tail's service area that might apply for the service mandated by the antitrust judgment and was to become effective on January 1, 1977, upon the termination of certain voluntarily negotiated contractual arrangements for excess capacity wheeling of Bureau of Reclamation (Bureau) power only. These contracts provided for excess capacity wheeling at a fixed rate established by a *Mobile-Sierra* contract.[5]

Otter Tail's contracts were held to be fixed rate contracts of the *Mobile-Sierra* type in *Otter Tail Power Company v. FPC*, 536 F.2d 240 (8th Cir. 1976) where the Court stated:

> "The USBR-Otter Tail contract executed on June 14, 1955, expressly requires Otter Tail to furnish transmission ser-

[4] *Otter Tail v. United States, supra*, p. 3.

[5] *United Gas Pipeline Co. v. Mobile Gas Service Corp., et al.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Company*, 350 U.S. 348 (1956). The *Mobile-Sierra* cases held generally that a supplier could not unilaterally raise the rates which it charges to customers where the rate is fixed by a contract that does not allow the supplier to file rate increases for the term of the contract, unless the Commission finds that the public interest requires such an increase where the contract rate "might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory," 350 U.S. at 355.

vice to certain municipalities at a specified rate until December 31, 1976." (536 F.2d at 242)[6]

The fixed rate nature of the old arrangements was also recognized in *Towns of Alexandria, Minn., et al. v. FPC*, 555 F.2d 1020, 1029-31 (D. C. Cir. 1977). Both of these decisions of the 8th Circuit and the District of Columbia Circuit Courts dealt with aspects of Otter Tail's efforts to file rates that would be compensatory and approved by the Commission for the service mandated by the antitrust judgment approved by this Court in the Otter Tail antitrust case.[7]

Otter Tail's October 4, 1976, tender for filing was made in anticipation of the expiration of the fixed rate contracts on December 31, 1976, according to the decision of the 8th Circuit in *Otter Tail v. FPC, supra*. The 1976 filing was substantially identical to a 1973 filing which Otter Tail made for mandated service to Elbow Lake and which the Commission had accepted for filing as an initial rate under Section 206 of the Act, 16 USC 824e, *Otter Tail Power Company*, 50 FPC 1341, "Order Accepting Filing, etc.", issued October 31, 1973, FPC Docket No. E.

However, in its December 28, 1976, Order, the Commission accepted Otter Tail's filing as a change in rates and suspended it for five months under Section 205 of the Act, 16 USC 824d. In its Order, the Commission did not mention its earlier ruling in the *Elbow Lake* case that Otter Tail's rate filing was

[6] Otter Tail's earlier effort to file a compensatory rate for firm wheeling (transmission) service to the other municipalities was determined to be premature in FPC Dockets Nos. E-9240 and E-9507, *aff'd sub nom. Otter Tail Power Co. v. FPC, supra*. The theory of the decision as to prematurity was that the Otter Tail-Bureau contract expressly required Otter Tail to furnish excess capacity transmission service to certain municipalities at a fixed rate until December 31, 1976.

[7] *Otter Tail v. United States, supra*, p. 3; affirming in part, and vacating and remanding in part, *United States v. Otter Tail Power Company*, 331 F. Supp. 54 (D. C. Minn. 1971).

an initial rate for a new type of service (R. 623, 514-9, esp. 623, 516, 519). Otter Tail then applied to the Commission for rehearing (R. 508-83) as required by Section 313 of the Federal Power Act, 16 USC 825*l*. The Commission first issued an Order granting rehearing for further consideration (R. 588-91) and then on June 2, 1977, issued an Order confirming its classification of Otter Tail's filing as a change in rates and maintaining its five-month suspension of the effective date of the rate.

No evidentiary hearings were held before the Commission. The record for review consists entirely of the filings of the parties before the Commission and the Commission's Orders.

If the Commission had determined that Otter Tail's filing was an initial rate for a new type of service, as it had earlier determined with respect to the Elbow Lake filing (50 FPC 1341), the rate would have gone into effect on January 1, 1977, upon the expiration of the Bureau-Otter Tail fixed rate contract, since initial rates filed under Section 206 of the Act are not subject to suspension.

Otter Tail is a public utility which sells electricity at retail in approximately 460 communities in western Minnesota, eastern North Dakota and northeastern South Dakota. The wholesale customers it formerly had became wholesale preference customers of the United States Bureau of Reclamation (Bureau)[8] with the construction of government dams on the Missouri River. Otter Tail agreed to wheel Bureau power on an excess capacity basis to 17 towns that in 1955 had municipal electric systems under a 1955 contract with the Bureau for a nominal charge of 1 mill/kWh and under 17 separate municipal rate schedules which provided for an additional 1.5

[8] Bureau power is marketed to preference customers which include municipal electric systems 43 USC 485h(c).

mills/kWh payment (less credit for generation) by the 14 municipalities in Minnesota (R. 470-87, 523, 535-6).

Elbow Lake, Minnesota, was, until 1966, one of the municipalities served at retail by Otter Tail. In 1966, Elbow Lake built its own diesel generating plant and distribution system and ousted Otter Tail. Even before its system was operating, Elbow Lake applied to the Commission to order an "emergency" interconnection between its new distribution system and Otter Tail's transmission system and to require Otter Tail to sell power to it at wholesale. The Commission ordered a short-term interconnection, *Village of Elbow Lake v. Otter Tail Power Co.*, 40 FPC 1262 (Opinion No. 551) (1968); *aff'd sub nom. Otter Tail Power Company v. FPC*, 429 F.2d 232 (8 Cir. 1970); *cert. denied* 401 U.S. 947 (1971). After further hearings, the Commission ordered Otter Tail to sell power to Elbow Lake at wholesale and required a long-term interconnection, *Village of Elbow Lake v. Otter Tail Power Co.*, 46 FPC 675 (Opinion No. 603) (1971); *aff'd in part and rev'd in part, sub nom. Otter Tail Power Company v. FPC*, 473 F.2d 1253 (8 Cir. 1973).

Elbow Lake had also asked the Commission to order Otter Tail to wheel Bureau power to the municipality, but the Commission ruled it lacked authority to order wheeling, *Village of Elbow Lake v. Otter Tail, supra*, 46 FPC 675; *Otter Tail v. FPC, supra*, 473 F.2d at 1255, n. 1; see also *Otter Tail v. United States, supra*, 410 U.S. at 375-6. Later, following this Court's landmark ruling that the antitrust laws applied to regulated utilities, Otter Tail was required by the judgment in the antitrust case[9] to wheel to municipal electric power systems in its service area, provided that the rates were compensatory and that the terms and conditions of the service were filed with

[9] See n. 7, p. 6, *supra*.

and approved by the Federal Power Commission. This important qualification on the required service was emphasized by the Supreme Court, 410 U.S. at 375 (*infra*, pp. 14-15), and was discussed by the Commission in acting on Otter Tail's rate filing for service to Elbow Lake, and by the D. C. Circuit, 555 F.2d at 1026-7, 1030-1.

The 1955 Bureau-Otter Tail contract gave Otter Tail the right to determine annually whether it had *excess* transmission capacity to provide wheeling service for the next four years in the amounts requested by the Bureau for serving Bureau customers (R. 519-21, 542-56). Otter Tail made no capacity commitments after 1972, and the commitment it gave in that year expired June 30, 1976, six months before the contract expired (*id.*).[10]

When the contracts were negotiated, it was recognized that the transmission facilities of the Bureau were inadequate to insure reliable service to the towns by point-to-point wheeling from the nearest Bureau-Otter Tail interconnection to each town. The Otter Tail Municipal Contract (R. 470-87) provided—

> "WHEREAS, the electric energy supplied by the Bureau for the Municipality is supplied through long transmission lines which are exposed to hazards of heavy sleet, severe wind and lightning conditions, prevalent in the area through which they extend;" (R. 470-1)

In order to insure continuity of service in the event there was an outage on the line from the nearest Bureau interconnection, Otter Tail provided an alternative path over its other facilities and was paid 1.5 mills/kWh by the Minnesota towns. The Bureau's transmission facilities were designed and con-

[10] Its commitment capacity to wheel to Alexandria expired in October of 1973. R. 520-1, 542-56.

structed in the decade that began more than 25 years ago, while Otter Tail, and the cooperatives and investor-owned suppliers in the area, with which it has joint or integrated transmission agreements, have steadily added to the regional transmission networks as loads in the area first doubled, and then quadrupled, in the several decades since the mid-50's. As a result, all of Otter Tail's retail and wheeling customers now receive transmission service over alternate paths through a regional integrated transmission network with many points of interconnection with other suppliers.

Immediately following this Court's landmark decision in the antitrust case, Otter Tail filed its compensatory rate for firm transmission service to Elbow Lake at $21.05/kW of transmission capacity per year. Since that time it has been attempting to establish an approved rate for the service it was required to provide (R. 142-9). It then had no rate on file with the Commission for the antitrust mandated service.

The Commission determined that the rate filed by Otter Tail for service to Elbow Lake was a new rate for a new type of service and ordered it into effect as an initial rate, 50 FPC 1341. Elbow Lake claimed it was entitled to 1 mill/kWh excess capacity wheeling service under the 1955 Bureau-Otter Tail contract. It applied to the Commission for rehearing, repeating its claim to the 1 mill/kWh excess capacity rate, but the Commission denied rehearing (see *Alexandria, et al. v. FPC, supra,* 555 F.2d at 1024). Elbow Lake did not appeal, and the Commission's ruling that Otter Tail's filing for Elbow Lake was an initial rate for a new type of service became final (R. 516).[11]

[11] The hearings in the Elbow Lake case were interrupted when the Commission ordered the case expanded to include the other towns, because Otter Tail had stated that the 1 mill wheeling rate was not compensatory and that it would apply the compensatory rate of

Otter Tail's filings with the Commission for Elbow Lake in 1973, and for the other municipalities in 1976, were substantially identical. Both provided for a firm wheeling rate of $21.05/kW/year.[12] Both provided for a new type of firm capacity wheeling service, from any supplier, to any municipal electric power system in its service area, at compensatory rates, and under terms and conditions filed with and subject to approval by the Commission, all pursuant to the mandate of the judgment in the Otter Tail antitrust case. When filed for Elbow Lake in FPC Docket No. E-8152, the Commission recognized that a substantially identical rate schedule was an initial rate. It stated—

> ". . . Otter Tail's submittal cannot realistically qualify as a change in rate schedule pursuant to Section 35.13 of our Regulations because *it effects a change in the nature of service* to Elbow Lake by supersedence of all-requirements wholesale service by wheeling of USBR power.
>
> "The Otter Tail filing amounts to *a new rate for a new type of service* and should so qualify pursuant to Section 205 of the Federal Power Act and Part 35.12 of the Regulations issued thereunder." (50 FPC 1341, Order, issued October 31, 1973, FPC Docket No. E-8152, quoted at R. 514) (Emphasis added.)

$21.05/kWh/year to the other towns as soon as it could do so. Elbow Lake and a number of other municipalities that had intervened in the Elbow Lake case sought review in the United States Court of Appeals for the District of Columbia Circuit (R. 143-4). Those appeals were dismissed, however, when the Court affirmed the Commission, *Alexandria et al. v. FPC, supra.*

[12] This rate was equivalent to approximately 5.2 mills/kWh for Elbow Lake and approximately 4.2 mills/kWh for the other municipalities considered as a group, due to differences in load factors, App. A, *infra,* p. A-6; see also *Alexandria et al. v. FPC, supra,* 555 F.2d at 1023-4.

The differences between the arrangements that had prevailed since the 1950's and the service provided under the new rate schedule filed by Otter Tail to comply with the antitrust judgment include—

1. The service to the municipalities is *firm* capacity service, while the Bureau-Otter Tail contract provided for *excess* capacity wheeling. Thus, Otter Tail is obligated to add whatever facilities may be required to provide whatever additional capacity is needed to provide the service, while under the Bureau contract, Otter, Tail could determine each year whether it had *excess* capacity available to the extent requested by the Bureau.

2. The Bureau contract provided for wheeling *Bureau power only*, while the rate filed with the Commission provides for wheeling *power from any supplier*. The injunction contained in the judgment in the antitrust case enjoins Otter Tail from refusing to wheel power from other power suppliers, and is not limited to Bureau power.

3. The rate filing is for wheeling and wholesale service for *any municipal* electric power *system within the normal service territory of Otter Tail*, while the old arrangement was for wheeling *only to certain towns* that already had municipal systems (R. 12, 13, 513, 522-3).

4. The new rate filed was in the form of a generally applicable *tariff*, and is *subject to change* by a subsequent filing by the Commission. The old arrangements were under *long-term, fixed rate*, Sierra-Mobile type *contracts* that had never been subjected to a rate investigation and had never been found to be just and reasonable.[13] A rate set by a Mobile-Sierra type contract cannot be changed unless both parties consent.[14]

[13] *Alexandria et al. v. FPC, supra*, 555 F.2d at 1029.
[14] *Ibid.* at 1030, n. 55, and *Otter Tail v. FPC supra*, 536 F.2d at 242.

5. The new wheeling and wholesale service was *compelled* by the injunction contained in the judgment in Otter Tail's antitrust case. The old arrangements were contained in long-term *voluntarily negotiated* contracts.

6. The rate for compelled service must be *compensatory* and *approved* by the Commission under the terms of the antitrust judgment. The rate under the old arrangements had been established more than 20 years ago under a fixed rate *Mobile-Sierra* type contract that had *never* been subjected to a rate investigation nor *found just and reasonable*, and is admittedly *not* now *compensatory*.

7. The filing includes a rate for *firm wholesale* service required to be furnished by the injunction contained in the antitrust judgment. The only service provided under the Bureau contract was *excess* capacity *wheeling* of Bureau power only.

ARGUMENT

I.

OTTER TAIL IS ENTITLED TO A COMPENSATORY RATE FOR THE COMPULSORY SERVICE MANDATED BY THE INJUNCTION CONTAINED IN THE ANTITRUST JUDGMENT. THE COMMISSION'S ACTION TREATING OTTER TAIL'S FILING AS A CHANGE IN RATES IMPROPERLY DEPRIVES OTTER TAIL OF THAT RIGHT.

The first two questions presented for review will be discussed together in this part.

A. The Antitrust Judgment is Central to the Issues.

The judgment in Otter Tail's antitrust case is central to understanding the issues presented by the Petition for Certiorari. It is the basis for the required wheeling that Otter Tail is providing to Elbow Lake and the other municipalities. Its importance arises from the fact that the Federal Power Act does not authorize the Commission to order wheeling.[15] In affirming the antitrust judgment, this Court stated—

"II

"The degree of the District Court enjoins Otter Tail from '[r]efusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in [its service area]' and from refusing to wheel electric power over its transmission lines from other electric power lines to such cities and towns. But the decree goes on to provide:

[15] See p. 8, *supra*.

" 'the defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.' " (*Otter Tail v. United States*, *supra*, 410 U.S. at 375)

The decision of the 8th Circuit recognizes that the rate for the compulsory service must be compensatory (App. A, *infra*, p. A-20) but it fails to recognize that the effect of the Commission's Orders is to deprive Otter Tail of a compensatory rate for the five-month suspension period.[16]

B. The Fundamental Nature of the Rate Filing Has Been Overlooked.

The decision of the 8th Circuit recognizes that Otter Tail's rate filings for Elbow Lake and the other municipalities were made to establish a compensatory rate for the new type of compulsory wheeling and wholesale service required by the antitrust judgment (App. A, *infra*, pp. A-2, 3). However, the Court and the Commission both attempt to treat the filing in question as though it were an ordinary filing subject to the Commission's routine exercise of discretion. Thus, the Court regards the new rate schedule as one intended to "supersede, supplement, cancel or otherwise change" the prior arrangements and, therefore, "would clearly constitute a rate change" (App. A, *infra*, p. A-12). It dismisses the fundamental differ-

[16] A compensatory, just and reasonable rate will be determined in the ongoing proceedings now before the Commission, but this rate will be applied only after May 31, 1977, and not effective on January 1, 1977.

ence in the type of service provided under the new rate by a deference to the alleged[17] "administrative expertise of the Commission" (App. A, *infra*, p. A-14). It erroneously regards its task as one of determining whether "the decision can . . . be rationally reconciled with the terms of the Act" (App. A, *infra*, p. A-9) and concludes that it

> "cannot say the Commission irrationally concluded that the new service provided was essentially the same as the old for purposes of determining whether the rate filed was an initial rate." (App. A, *infra*, p. A-15)

In all of these respects, the Court and the Commission have erred. *First*, the Commission is without power to order the wheeling service provided under the rate schedule. *Second*, under the terms of the antitrust judgment, service is not required "except at rates which are compensatory". The treatment of the filing as a change in rates and its suspension for five months has the effect of compelling Otter Tail to provide mandated service at non-compensatory rates. This Court conditioned its approval of the antitrust judgment that compelled Otter Tail to provide service by emphasizing the provision of that judgment that the compulsory service was required to be furnished only under compensatory rates (*supra*, pp. 14-15).

The rate sheets in the filing themselves refer to and include the text of the antitrust judgment (R. 7, 12-13, 26, 138-49, 151-

[17] There was a complete turnover of commissioners between the ruling on Otter Tail's Elbow Lake filing in 1973, 50 FPC 1341, (which was by John N. Nassikas, chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer), and the December 31, 1976, and June 2, 1977 Orders that are the subject of this Petition (which were issued by Richard L. Dunham, chairman; Don S. Smith, and James G. Watt (R. 489), and Messrs. Dunham, Smith, John H. Holoman III, and Watt (R. 588), respectively). This strongly suggests that the alleged expertise is mythical, rather than real.

54). No such rate schedule would have been filed if there had been no antitrust decree. Yet the Commission's December 28, 1976, Order (R. 489-500) never once mentions the antitrust judgment or the Otter Tail antitrust case (R. 537-8). Otter Tail submits that the Commission must harmonize its action on the filing with the provisions of the antitrust decree, which condition the required service on compensatory rates.[18]

C. The Effect of the Commission's "Rate Change" Classification on the Rate for Service Prior to June 1, 1977, Has Been Ignored.

It can be assumed for the purposes of this Petition for Certiorari that a compensatory, just and reasonable rate for the compulsory service will be determined in the ongoing proceeding now pending before the Commission (App. A, *infra*, p. A-20). However, the rate so determined will apply *only* to wheeling service furnished by Otter Tail *since* June 1, 1977, the effective date of the new rate under the Commission's

[18] The D. C. Circuit similarly observed in *Alexandria, et al. v. FPC, supra*, that the question of alleged discrimination presented there could not be segregated from the question of a compensatory, just and reasonable rate for Otter Tail. Both objectives must be achieved. The twin objectives are to provide (1) the required service, and (2) a compensatory rate. The effect of the Commission's action, however, was to put into effect a rate of 1 mill/kWh for six cities (Alexandria, Barnesville, Benson, Detroit Lakes, Henning and Warren, Minnesota) when the old rate was 2.5 times that (2.5 mills/kWh and the compensatory rate under Otter Tail's filing is more than four times that (or approximately 4.2 mills/kWh on the average, (R. 490) and to make this rate effective for these towns not only for the first five months of 1977, but also, retroactively, for periods as far back as March 20, 1975, for Alexandria, and February 18, 1975 for Tyler, and November 30, 1975, for Barnesville, Benson, Detroit Lakes, Henning and Warren (R. 499, 535-6). This is hardly in harmony with the antitrust decree or the Commission's 1973 Orders on the Elbow Lake filing. Indeed, in testimony filed in the current proceedings before the Commission, both the Cities and the Commission Staff have conceded that Otter Tail's costs are well in excess of 1 mill/kWh. The opinion of the D. C. Circuit addresses the same point in 555 F.2d at 1029-31.

Orders, after the expiration of the five-month suspension period. The view of the Eighth Circuit and the Commission, that emphasizes that a rate that is compensatory as required by the antitrust judgment and that is just and reasonable as required by the Federal Power Act will be established by the hearings, ignores the fact that the rate that will be determined will only apply to the period beginning June 1, 1977, and that Otter Tail was required to provide service during the five-month suspension period, and prior to June 1, 1977, at a non-compensatory rate.

The effect of the Commission's "rate change" classification and its accompanying suspension of the compensatory rate which Otter Tail had filed, is to require Otter Tail to provide compulsory wheeling service to six municipalities for a bare one mill/kWh.[19] The effect is also to require Otter Tail to furnish wheeling service to the other seven Minnesota towns[20] for a total of 2.5 mills/kWh for five more months, while one town (Elbow Lake) is paying $21.05/kW/year under the Commission's 1973 final Orders on Otter Tail's earlier filing. Thus, the effect of the Commission's classification is to introduce a new form of rate discrimination, and to require Otter Tail to charge it, by Commission order, when the statutory duty of the Commission under the Federal Power Act is to insure that no public utility "(1) make or grant any undue preference or advantage . . . or subject any . . . [customer] . . . to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates . . . [or] . . . charges," Section 205(b), 16 USC 824(b).[21]

[19] Alexandria, Barnesville, Benson, Detroit Lakes, Henning, and Warren, Minnesota. Tyler, Minnesota, terminated its wheeling service from Otter Tail on June 23 1976. App. A, *infra*, p. A-5.

[20] Breckenridge, Lake Park, Newfolden, Nielsville, Ortonville, Shelly, and Stephen, Minnesota.

[21] App. B, *infra*, p. B-1.

In addition, the effect of the Commission's order is to retroactively introduce discrimination between the rates paid for wheeling service furnished prior to January 1, 1977. The Commission's orders retroactively allowed the seven cities of Alexandria, Barnesville, Benson, Henning, Tyler, and Warren, Minnesota, to pay a bare 1 mill/kWh for wheeling service prior to January 1, 1976, while seven other Minnesota cities (Breckenridge, Lake Park, Newfolden, Nielsville, Ortonville, Shelly, and Stephen, Minnesota) paid 2.5 mills/kWh.[22]

D. The Commission's "Rate Change" Classification Deprives Otter Tail of a Compensatory Rate for Compulsory Service Prior to June 1, 1977.

For the reasons just explained, it is clear that the effect of the Commission's action in classifying Otter Tail's filing as a change in rates and suspending its effective date from January 1 to June 1, 1977, has been to prevent Otter Tail from charging and collecting a compensatory rate for the service it has furnished prior to the June 1, 1977, effective date ordered by the Commission. This is so even though it can be assumed for these purposes that the rate ultimately determined by the Commission on Otter Tail's filing will be a compensatory, just and reasonable one for the period *beginning* June 1, 1977.[23] Meanwhile, Otter Tail has been forced to furnish firm wheeling service under the compulsion of the injunction contained in the antitrust judgment since the expiration of the Otter Tail-Bureau contract on December 31, 1976, at a non-compensatory rate.

[22] See n. 18, *supra*.

[23] The determinatiton of a compensatory, just and reasonable rate by the Commission in the ongoing proceeding now pending before the Commission will apply only from the effective date of the rate, which is now June 1, 1977.

This result is in direct conflict with paragraph V. of the judgment in the antitrust case as affirmed by this Court and is in error. A federal question has been decided in a way in conflict with applicable decisions of this court.[24] Certiorari should be granted so that the errors of the lower Court and the Commission can be reversed.

II.

THE ACTION OF THE COMMISSION, WHICH WAS APPROVED BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IS IN CONFLICT WITH THE RULES OF LAW ANNOUNCED AND APPLIED BY ANOTHER COURT OF APPEALS AND IS IN ERROR.

A. The Effect of the Commission's Action is to Introduce and Establish Preferential and Discriminatory Rates.

In issuing the orders under review here, the Commission evidently thought that the *Sierra-Mobile* doctrine was a controlling principle which required it to recognize the contract expiration dates of seven Minnesota municipalities[25] that had filed a complaint against Otter Tail in FPC Docket No. E-9544 (R. 490-2, 494-6). That is evident, because by recognizing 1975 termination dates for these seven towns (R. 499, par. (J)), the Commission reduced the rate for wheeling service for them to a bare 1 mill/kWh, retroactive to various dates in 1975. This action by the Commission established a preferential and discriminatory rate that had never existed before and that directly conflicts with the Commission's statutory duty under the

[24] Rule 19(b), United States Supreme Court Rules.

[25] Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Tyler, and Warren, Minnesota.

Act. Under the Commission's action, these seven preferred towns that filed the complaint were given a 1 mill rate for some 18 to 26 months,[26] while the other seven municipalities[27] paid a rate two and one-half times[28] that amount.

B. The Commission's Preferential and Discriminatory Rate Setting Is Based Upon an Erroneous Construction of Otter Tail's Service Contracts with the Towns.

It was never intended that a 1 mill/kWh rate would apply to these towns. The Otter Tail-Municipal contract (R. 470-87) itself shows conclusively that the service contract is an essential and interlocking part of wheeling service to municipalities under the Otter Tail-Bureau contract, including the payment of an additional 1.5 mills/kWh to Otter Tail for wheeling Bureau power. The Otter Tail-Municipal contract specifically provides that it interlocks with the Bureau-Municipal contract and the Bureau-Otter Tail contract. The sixth "Whereas" clause of the standard contract between Otter Tail and the municipalities reads as follows:

> "WHEREAS, Both the Bureau and Otter Tail are desirous of cooperating with the Municipality in sharing such benefits, and in sharing their pooled resources which are available to the Municipality *under the terms of this*

[26] Under the Commission's Order, Alexandria was given a 1 mill rate from March 20, 1975, to May 31, 1977, a period of more than 26 months. Five towns,—Barnesville, Benson, Detroit Lakes, Henning, and Warren,—were given a 1 mill rate from November 30, 1975, to May 31, 1977, a period of 18 months. Tyler was given a 1 mill rate from February 18, 1975, until it discontinued wheeling service from Otter Tail on June 23, 1976. See n. 18, *supra*, and R. 535-6.

[27] Breckenridge, Lake Park, Newfolden, Nielsville, Ortonville, Shelly, and Stephen, Minnesota.

[28] One mill/kWh was paid under the Bureau—Otter Tail contract, and another 1.5 mills/kWh was paid under the Otter Tail—Municipal agreement.

Agreement and other interlocking agreements hereinafter referred to;" (R. 471).

The contract lists the "other interlocking agreements" in Article 2, as follows:

"ARTICLE 2—REFERENCES

"*Section 2a. Bureau-Municipality Contract.* The contractual arrangements between the Bureau and the Municipality which have been or may hereafter be, entered into between the Bureau and the Municipality for the sale and purchase of electric service, are hereinafter referred to as the 'Bureau-Municipality Contract.'

"*Section 2b. Bureau-Otter Tail Contract.* The Bureau and Otter Tail have entered into contractual arrangements, the current contract being . . . dated June 14, 1955, as supplemented, which contract together with any supplements, modifications, or additions thereto which may be hereafter entered into, are hereinafter referred to as the 'Bureau-Otter Tail Contract.' " (R. 473)

Article 3 also contains the following language:

"Otter Tail agrees to accept delivery of electric power and energy into its transmission system from the Bureau in accordance with the Bureau-Otter Tail Contract, and to deliver an equivalent amount of electric power and energy, adjusted for losses, as therein provided, to the Municipality . . . as provided in Schedule 3aa—'Transmission Service,' hereto attached . . .

"As provided in the Bureau-Otter Tail Contract, transmission service furnished by Otter Tail thereunder, and the rate of compensation therefor are based upon excess capacity available in Otter Tail's transmission lines, . . .

It is also expressly agreed that *the amount agreed to be paid by the Bureau to Otter Tail for transmission service furnished hereunder is not sufficient, or intended to support or pay for, the . . . other services furnished by Otter Tail to the Municipality herein provided.*" (R. 473-4)

In the face of these provisions, it is clearly error for the Commission and the Court to take the view that the Otter Tail-Municipal contract was not interlocked with the Bureau-Otter Tail contract and was not essential to wheeling service to the towns under it. In addition, it was clearly error for the Commission to act without allowing an evidentiary hearing on the question when Otter Tail repeatedly requested one.[29]

Without the Otter Tail-Municipal contracts, there is no provision for an interconnection with the Municipality's electric system, or for its location, the physical facilities to be supplied and for their operation. Essential provisions for an oil circuit breaker, switching equipment, metering, interruption of service, alternate delivery paths, and a backup power source are all contained in the Otter Tail-Municipal contract (R. 462-5, 470-87). The Cities cannot abandon the part of the arrangement that is covered by these provisions, as they sought to do in their complaint, without also losing the other essentials of wheeling service, including the right to the interconnection and to wheeling service itself.[30] Certainly the antitrust judgment never was intended to have that effect or to put these

[29] See R. 398-41 and 453-68, esp. R. 410 (par. VIII.) and R. 467.

[30] When the towns that have intervened seek some benefit from the continuation of the municipal contracts, as in the case of Lake Park and Ortonville, that also had expiration dates of December 1, 1975 (R. 371, 500; App. A, *infra*, p. A-5), there is no hesitancy in urging that Otter Tail's obligations continue beyond the expiration date (see R. 372-3). Fundamental fairness requires that this essential part of the arrangement continue for all towns.

seven preferred towns in the position of getting compulsory wheeling service from Otter Tail at a reduced non-compensatory rate that represented only 40% of the amount they had previously paid (1 mill ÷ 2.5 mills = .40 or 40%).

It has been claimed here that Otter Tail's view of the interlocking agreements and its insistence that a contract with each town is essential to wheeling service represents a "package deal" argument that was rejected earlier by the Commission and the court. This is not so. The two matters are not the same. The matter disposed of in *Otter Tail v. FPC*, 536 F.2d at 242, n. 2, was Otter Tail's claim that the antitrust decision vitiated the Bureau-Otter Tail contract by invalidating a vital and inseverable part of the agreement, thereby terminating Otter Tail's obligation to wheel to the Cities under the agreements. The court held only that Otter Tail must continue to wheel until December 31, 1976, when the Bureau contract would expire. That case did *not* decide that the towns were not obligated to pay an additional 1.5 mills/kWh or that their obligation to pay Otter Tail was not inextricably interlocked with the right to obtain service under the Bureau-Otter Tail contract. On the contrary, the proper inference from the earlier decision is that the obligation to pay continues.

If the Commission had properly recognized the true interlocking nature of the Municipal contracts and its obligations under Section 205(b), it would never have established the bare 1 mill rate that is preferential and discriminatory.

C. The Commission Erroneously Ignored Section 205(b) in Regarding the *Sierra-Mobile* Doctrine as the Sole Controlling Principle.

The Commission's neglect of Section 205(b) that led it to establish the new non-compensatory and preferential 1 mill/kWh rate is part of the same Commission attitude that led it to ignore Section 205(b) in taking the action that was found to be in error by the United States Court of Appeals for the District of Columbia in *Town of Norwood, Mass. v. FERC*, —— F.2d ——, D.C. Cir. No. 77-1326 (October 23, 1978), 16 FPS 6-37. *Norwood* holds that the *Sierra-Mobile* doctrine, and the importance it places on contract expiration dates, is not necessarily controlling in these circumstances. The Commission must also consider the non-discrimination requirement of Section 205(b). The Court in *Norwood* refers to its decision in *Boroughs of Chambersburg, et al. v. FERC*, 580 F.2d 573 (D.C. Cir. 1978) where it was

> ". . . made . . . quite clear that the mere presence of a *Mobile-Sierra* contract will not automatically shield any and all discriminatory treatment from attack under Section 205(b) of the Federal Power Act. Rather, that section remains an independent force which must be accommodated . . .
>
> ". . . [T]he Commission . . . did not arrive at an adequate accommodation." (16 FPS at 6-45)

In *Norwood*, the Commission failed to consider the three alternatives that were open to it where a fixed-rate contract is involved and a question of possible discrimination was presented. It did not examine whether, to avoid discrimination, one of the rates should have been adjusted upwards or down-

wards, to make the two rates identical, and blindly followed the fixed-rate contract to its expiration date in a single-minded adherence to the *Mobile-Sierra* doctrine that the D.C. Circuit found was fundamentally in error.

Similarly, here the Commission did not consider that it was free to adjust the rate, in order to avoid the preference and discrimination it introduced,[31] upwards to the $21.05/kW/year of the Elbow Lake rate that had been in existence for that town for three years, or maintained at the 2.5 mills/kWh rate that had been in effect for some 20 years and that the other seven towns would continue to pay until June 1, 1977, under its Orders. The Commission felt bound by *Sierra-Mobile* to follow the expiration dates of these seven municipal-Otter Tail contracts. The full range of possible actions which the D.C. Circuit found are available and which must be considered if Section 205(b) is not to be read out of the Act, were not weighed by the Commission in the manner *Norwood* requires.

D. The Eighth Circuit's Affirmance of the Commission's Erroneous Orders Is Directly in Conflict with the Ruling of the District of Columbia Circuit in *Norwood*.

The Eighth Circuit's affirmance of the Commission's action creating this discrimination, through the Commission's adherence to the *Sierra-Mobile* doctrine and its neglect of Section 205(b) is clearly in conflict with *Norwood*. In both cases, the law of discrimination in its tension with the *Sierra-Mobile* doctrine, is developed in a manner that conflicts with the Commission's orders under review here as approved by the Eighth Circuit.

[31] By recognizing termination dates of the Otter Tail-Municipal contracts of the seven towns that filed a complaint.

This issue is essentially the same point that Otter Tail raised below when it repeatedly called attention to the inappropriate disparity between the 1-mill rate established by the Commission's Orders and the rates paid by the other towns.[32] It is now given added significance by the D.C. Circuit's recognition of two intersecting principles that must be reconciled—*Mobile-Sierra* and Section 205(b). Here there is yet a third principle, unique to this case, that must be accommodated, but that was ignored below, namely the requirement of the antitrust judgment that the rate for compulsory wheeling be compensatory.

The direct conflict between the Commission's view, affirmed by the Eighth Circuit, and reversed and remanded by the D.C. Circuit, should be resolved and corrected by this court by granting the Writ of Certiorari.

E. The Eighth Circuit's Affirmance of the Commission's Power to Change Its Standards for Classifying Rate Filings Also Conflicts with the Views of Another Court of Appeals.

Otter Tail's 1973 filing for Elbow Lake was classified as an initial rate, 50 FPC 1341. Its 1976 filing for the other towns of a substantially identical rate was classified as a change in rates. The Eighth Circuit describes the Commission's shift as

> ". . . refin[ing] the distinction between the initial and changed rates that was drawn in the Elbow Lake case." (583 F.2d 408; App. A, *infra*, p. A-16)

[32] The Petition for Rehearing makes this point (R. 535-6), and it was treated in Otter Tail's briefs to the Eighth Circuit (Brf. for Pet., pp. 25-7, 46-9; Reply Brf. for Pet., pp. 10-13, 22-3).

However, the Commission itself has repeatedly acknowledged that since its 1973 rulings in the Elbow Lake case, 50 FPC 1341, it has *changed* its standards for determining whether a rate filing is a change in rates or an initial rate. What the Commission did not state explicitly in the Orders under review here it has since acknowledged in the Commission's brief to the Eighth Circuit (Brief for Respondent FERC, at pp. 29-30). It has also now stated—

> ". . . it is clear that the Commission does not now hold the same interpretation of the Federal Power Act that underpinned *Otter Tail Power Company*, 50 F.P.C. 1341 (1973)." (*Cleveland Electric Illuminating Company*, "Order on Rehearing," issued September 5, 1978, FERC Docket No. ER78-194, Slip Order at p. 3)

The Commission urged, and the Eighth Circuit affirmed it, that classifying a substantially identical filing as an initial rate in 1973 and as a change in rates in 1976 is reasonable and proper, even though it did not announce a change in its standards of classification. This Commission cannot arbitrarily and capriciously take opposite views on fundamental policy matters without notice and opportunity for hearing. When the Commission decides to reverse its course, it must give notice that the standard is being changed, and apply the changed standard only to those actions taken by parties after the new standard has been legally adopted and placed in effect, *Boston Edison Co. v. FPC*, 557 F.2d 845, 848-9 (D.C. Cir. 1977); *cert. denied*, —— U.S. ——, 54 L.Ed. 2d 314 (1977). The Eighth Circuit's determination that the Commission's action is "rationally based" ignores fundamental due process requirements and directly conflicts with the views of the District of Columbia Circuit in *Boston Edison*.

CONCLUSION

Certiorari should be granted to review the conflict in the circuits and the Commission's decision of a federal question in conflict with this Court's decision in the Otter Tail antitrust case.

Respectfully submitted,

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Dated: December 6, 1978.

CERTIFICATE OF SERVICE

I, David F. Lundeen, attorney for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify all parties required to be served have been served. Such service was made on the 6th day of December, 1978, by mailing copies of the Petition for Writ of Certiorari to the respondents named below by depositing the same in the United States Post Office, with postage prepaid, addressed to the following:

Donald R. Allen
Duncan, Allen and Mitchell
1775 K Street, N.W.
Washington, D. C. 20006

and by delivering copies thereof to each of the following:

Robert R. Nordhaus, General Counsel
Federal Energy Regulatory Commission
Washington, D. C. 20426

Solicitor
Federal Energy Regulatory Commission
Washington, D. C. 20426

Solicitor General
Department of Justice
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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1582

OTTER TAIL POWER COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

ALEXANDRIA, BARNESVILLE, BENSON, DETROIT LAKES, HENNING, LAKE PARK, ORTONVILLE, and WARREN, MINNESOTA, and BIG STONE CITY, SOUTH DAKOTA,

Intervenor-Respondents.

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION.

Submitted: May 17, 1978
Filed: September 8, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

This is another episode in the continuing dispute over rate schedules filed by Otter Tail Power Co., a public utility subject

to the Federal Power Act,[1] and the Federal Energy Regulatory Commission.[2] The basic issue here presented is whether the Commission properly exercised its authority in the suspension of certain rate schedules for transmitting electricity proposed by Otter Tail to be charged several municipalities in Minnesota and South Dakota. We uphold the Commission's ruling.

I

Otter Tail Power Company sells electricity at retail to several municipalities in Minnesota, North Dakota and South Dakota. In years past, several retail customers sought to establish their own municipal electric systems upon the expiration of the retail distribution franchises awarded Otter Tail. Otter Tail's refusal to sell energy at wholesale or "wheel"—transmit—power to these municipalities resulted in an antitrust action in which Otter Tail was found guilty of monopolizing the retail distribution of electric power in its service area. *See United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 56 (D. Minn. 1971), *aff'd in part and vacated and remanded in part*, 410 U.S. 366 (1973). As a result Otter Tail was enjoined from refusing to sell electric power at wholesale and from refusing to wheel electric power over its transmission lines. 410 U.S. at 375-77.

Prior to the culmination of the antitrust action, the Village of Elbow Lake, Minnesota, who is not a party to this case but was a former retail customer of Otter Tail, successfully es-

[1] 16 U.S.C. §§ 824(b), (e).

[2] Effective October 1, 1977, the Federal Power Commission became the Federal Energy Regulatory Commission (FERC), an independent regulatory agency within the Department of Energy, Sections 401, 402, 406, Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. §§ 7171, 7172, 7176.

tablished its own municipal distribution system and obtained an order from the Commission that required Otter Tail to furnish wholesale power.[3] Immediately after the Supreme Court upheld the antitrust injunction against Otter Tail, Elbow Lake contracted with the Bureau of Reclamation for wholesale power and requested Otter Tail to wheel the power to its distribution system. Accordingly, Otter Tail sought Commission approval to set a compensatory rate at five mills per kilowatt hour for this service.

The Commission ruled that the service to Elbow Lake was an initial rate for a "new type of service" under § 205 of the Federal Power Act, 16 U.S.C. § 824d (1970) and 18 C.F.R. § 35.12 (1976) of the regulations issued thereunder.[4] This decision was not appealed. The Commission then ordered a hearing to determine whether the rate was compensatory, just and reasonable. Elbow Lake asserted that the five mill rate was discriminatory because it exceeded rates charged to 17 other municipalities in Minnesota and South Dakota that had been receiving electrical power from the Bureau wheeled by Otter Tail.[5] Otter Tail countered by arguing that the one mill

[3] *See Village of Elbow Lake, Minn. v. Otter Tail Power Co.*, 40 F.P.C. 1262 (1968), *aff'd sub nom. Otter Tail Power Co. v. FPC*, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947, 91 S.Ct. 923 (1971); *Village of Elbow Lake, Minn. v. Otter Tail Power Co.*, 46 F.P.C. 675 (1971), *modified*, 473 F.2d 1253 (8th Cir. 1973).

[4] *Otter Tail Power Co.*, 50 F.P.C. 1341, 1343 (1973).

[5] The rate for the 17 municipalities was originally fixed in 1955 by a contract between Otter Tail and the Bureau of Reclamation. Pursuant to this contract, Otter Tail agreed to wheel power from the Bureau's Missouri River dams to the 17 municipal power systems for a service charge of 1 mill per kilowatt hour. The contract called for only "excess capacity" wheeling; that is, Otter Tail was required to wheel power only to the extent that it had transmission line capacity in excess of that needed to supply its own retail customers.

In addition, several of the municipalities entered into separate agreements with Otter Tail for "firming transmission service" at an additional charge of 1.5 mills per kilowatt hour. Under these agreements Otter Tail was bound to provide electricity in the event its excess capacity was insufficient to meet the power needs of the municipalities.

flat rate to the 17 towns was not compensatory and that an increased rate would soon be established for these services since the firm wheeling contracts for most of the municipalities had by their terms expired and the Bureau—Otter Tail contract was due to expire on December 31, 1976. The Commission thereafter revised its hearing order to include the 17 municipalities and ordered that they be permitted to intervene as parties.[6] Ten of the municipalities took advantage of this order and the Commission granted their petition to intervene.[7]

Meanwhile, on October 4, 1976, Otter Tail attempted to adjust its rate schedule and service obligations regarding the 17 municipalities. On that date Otter Tail tendered for filing with the Commission the following documents: (1) an "Initial Rate Schedule Providing for a Compensatory Rate for Firm Wheeling (Transmission) Service, Applicable to Municipalities;"[8] (2) a notice of termination of the Bureau—Otter Tail contract to be effective on December 31, 1976;[9] and (3) notices of termination of the 17 special municipal agreements to be

[6] *Otter Tail Power Co.*, (order expanding hearing), 52 F.P.C. 1007, 1008-09 (1974).

[7] *Otter Tail Power Co.*, (order denying rehearing), 52 F.P.C. 1572, 1574 (1974). Thereafter Elbow Lake and the intervenors objected to the expanded hearing, but the Commission affirmed its original order. Elbow Lake and the 10 towns sought review in the Court of Appeals for the District of Columbia. The Commission's discretion in ordering the expanded hearing was upheld; the court affirmed the Commission's ruling not to separate from the hearing Elbow Lake's contention of discriminatory treatment. *Towns of Alexandria, Minn. v. FPC*, 555 F.2d 1020, 1032-33 (D.C. Cir. 1977).

[8] Otter Tail was advised on October 28, 1976 that its submittal did not contain all information necessary. This deficiency was corrected by Otter Tail on November 15, 1976, and the Commission ordered that the later date constituted the official filing date. *Otter Tail Power Co.*, (order accepting and suspending filings, FPC Nos. ER77-5, ER77-6, ER77-7 and E-9544) (Dec. 28, 1976).

[9] This contract terminated according to its own terms on December 31, 1976.

effective on December 31, 1976.[10] Otter Tail sought to commence service under the newly filed rate schedule on January 1, 1977.[11]

Nine of the municipalities[12] affected by Otter Tail's proposed rate schedule intervened to protest the proposed rate schedule and the termination of the Bureau—Otter Tail rate schedule. Eight of these cities[13] also intervened to protest

[10] The special municipal agreements provided for varying expiration dates, none of which fell on December 31, 1976.

Special Municipal
Electric Service Agreement Provisions

Municipal	*Term*	*Expiration Date*
1. Alexandria, MN	10 years	10-20-72
2. Badger, S.D.	10 years	1-1-76
3. Barnesville, MN	10 years	12-1-75
4. Benson, MN	10 years	12-1-75
5. Big Stone City, S.D.	10 years	1-1-76
6. Breckenridge, MN	10 years	12-20-79
7. Detroit Lakes, MN	10 years	12-1-75
8. Estelline, S.D.	10 years	1-1-76
9. Henning, MN	10 years	12-1-75
10. Lake Park, MN	10 years	12-1-75
11. Newfolden, MN	10 years	12-20-79
12. Nielsville, MN	10 years	12-1-75
13. Ortonville, MN	10 years	12-1-75
14. Shelly, MN	10 years	12-21-80
15. Stephen, MN	10 years	12-1-75
16. Tyler, MN	Service discontinued 6/23/76	
17. Warren, MN	10 years	12-1-75

See Otter Tail Power Co., (order accepting and suspending filings, Attachment A, FPC Nos. ER77-5, ER77-6, ER77-7 and E-9544) Dec. 28, 1976).

[11] In a prior case it was determined that an earlier effort to file a compensatory rate for firm wheeling service to the municipalities was premature, and that the Bureau—Otter Tail contract executed on June 14, 1955, expressly required Otter Tail to furnish transmission service to the municipalities at a fixed rate until December 31, 1976. *Otter Tail Power Co.*, (orders rejecting filings, FPC Nos. E-9240 and E-9507) (1975), *aff'd sub nom. Otter Tail Power Co. v. FPC*, 536 F.2d 240, 242 (8th Cir. 1976).

[12] Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville and Warren, Minnesota, and Big Stone City, South Dakota.

[13] Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville and Warren, Minnesota.

the alleged attempt by Otter Tail to perpetuate the special municipal agreements past their expiration dates.[14] In addition, seven of the cities[15] filed a complaint with the Commission requesting that the termination dates of the special municipal agreements be confirmed in accordance with the terms of such agreements.

On December 28, 1976, the Commission issued one of the orders that gave rise to this appeal.[16] The Commission accepted Otter Tail's tendered filing of October 4, 1976, for a compensatory firm wheeling rate schedule.[17] However, the Commission rejected Otter Tail's petition to order the new rate effective January 1, 1977, and held that the rate application did not constitute an "initial" rate under § 206 of the Federal Power Act. The Commission found instead that the filing was a rate change subject to suspension under the Act, 16 U.S.C. § 824d(e). Pursuant thereto the Commission ordered the effective date of the rate change for wheeling suspended for five months from January 1, 1977 to June 1, 1977. The Commission also accepted and suspended for five months Otter Tail's separate notices of termination of the special municipal agree-

[14] All of the special agreements between Otter Tail and the eight intervenors were to expire by their terms prior to December 31, 1976. See table contained in note 10, supra.

[15] Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Tyler and Warren, Minnesota.

[16] *Otter Tail Power Co.*, (order accepting for filing and suspending certain proposed rate schedule filings, establishing procedures, consolidating proceedings and granting interventions, FPC Nos. ER77-5, ER77-6, ER77-7 and E-9544) (Dec. 28, 1976).

[17] Otter Tail's filed rate is slightly lower than the five mills being charged to Elbow Lake. The rate filed in this proceeding for the 17 municipalities was the same $21.05/kW/year rate as filed for Elbow Lake; the Commission calculated that for the municipalities considered as a group, the rate was equivalent to approximately 4.2 mills/kWh.

ments regarding the cities that did not protest the termination.[18] The effective termination dates of the special agreements of the remaining seven cities were fixed at dates prior to December 31, 1976.[19]

Two months later the Commission granted Otter Tail's request for a rehearing of the December 28, 1976, order, but only for the limited purpose of further consideration.[20] On June 2, 1977, the Commission affirmed its earlier decision.

II

The major effect of the Commission's ruling is that the rate increase was delayed for five months and the increased rate charged the 17 towns[21] commencing June 1, 1977, is subject to refund in the event the Commission determines in the ongoing rate hearing that the rate is unjust or unreasonable.[22] This is in contrast to the new rate now being charged Elbow Lake.[23] In the event that rate is held to be excessive, the Commission could order a prospective rate reduction.[24] The Com-

[18] Thus, May 31, 1977, was fixed as the termination date of the special agreements with the cities of Badger, Big Stone City, and Estelline South Dakota, and Breckenridge, Lake Park, Newfolden, Nielsville, Ortonville, Shelly and Stephen, Minnesota.

[19] The effect of the Commission's order was that during the interim between December 31, 1976, and June 1, 1977, some of the towns paid 1 mill/kWh while other towns paid 2.5 mills/kWh.

[20] *Otter Tail Power Co.*, (order granting rehearing for further consideration, FPC Nos. ER77-5, ER77-6, ER77-7 and E-9544) (Feb. 25, 1977).

[21] The record indicates that only 15 towns will actually be affected by the new rate. Two of the 17 towns, Tyler, Minnesota and Estelline, South Dakota apparently have no further need to receive service from Otter Tail since they are receiving transmission service from other sources.

[22] Federal Power Act § 205, 16 U.S.C. § 824d(e).

[23] We note, however, that Elbow Lake's claim of discrimination is still a viable issue before the Commission in the rate hearing. *See Towns of Alexandria, Minn. v. FPC*, 555 F.2d 1020, 1031 (D.C. Cir. 1977).

[24] Federal Power Act § 206, 16 U.S.C. § 824e.

mission possesses no authority, however, to order a refund for the period the excess rate is charged to Elbow Lake.[25]

Otter Tail now seeks review of the Commission's latest orders as they affect the rate filed for the 17 communities. It urges that the Commission erred (1) in failing to file the rate schedule as an initial rate under § 205, (2) in failing to make Otter Tail's newly filed rate for firm wheeling service applicable to the towns effective January 1, 1977, (3) in suspending the expiration and termination of the Bureau—Otter Tail contract beyond December 31, 1976, and (4) in failing to recognize the termination of the separate municipal rate schedules for each town on December 31, 1976.

Before assessing the merits of these contentions we first summarily dispose of the intervenors' and Commission's claim that the suspension of Otter Tail's rate increase is not a reviewable matter. The Commission urges that suspension or the refusal to suspend a rate change is a nonreviewable exercise of agency discretion. *See City of Westfield v. FPC*, 551 F.2d 468, 468 (1st Cir. 1977); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1351 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). We have no disagreement with these authorities. The Commission's discretionary suspension power, however, exists only when a utility files a rate change. Accordingly, an initial inquiry must be made to determine whether the Commission has exceeded the scope of its authority in declaring the newly filed rate a change in rate rather than an initial one. Because of Commission's characterization of the rate affects its basic authority under the Act, the Commission's decision

[25] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956).

is reviewable. *Cf. Trans Alaska Pipeline Rates Cases*, 98 S.Ct. 2053, 2058-59 n.17 (1978).

The fundamental question relating to all issues on review is whether the Commission appropriately characterized the Otter Tail rate filing a changed rate. If the Commission erred in its determination, it of course would have no statutory power to suspend the new rate or continue the old rate.

In order to reject the Commission's rate change conclusion this court must find that the decision cannot be rationally reconciled with the terms of the Act. *See Gulf Oil Corp. v. FPC*, 563 F.2d 588, 606 (3d Cir. 1977), *cert. denied*, 98 S.Ct. 1235 (1978); *Distrigas of Massachusetts Corp. v. FPC*, 517 F.2d 761, 765 (1st Cir. 1975); *Southern California Edison Co. v. FPC*, 387 F.2d 619, 621 (3d Cir. 1967), *cert. denied*, 392 U.S. 909 (1968). Accordingly, an initial examination of the relevant statutory provisions is required.

The Act nowhere defines initial rates or changed rates. Instead, the distinction arises from the basic statutory scheme that defines the Commission's power and prescribes certain procedural prerequisites for the exercise of that power.

Section 206 of the Act, 16 U.S.C. § 824e, provides in part:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or con-

tract to be *thereafter* observed and in force, and shall fix the same by order.

(Emphasis added).

Section 205(d) of the Act, 16 U.S.C. § 824d(d), requires in part:

> Unless the Commission otherwise orders, no *change* shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.

(Emphasis added).

Section 205(e), 16 U.S.C. § 824d(e) reads in part:

> Whenever any *such* new schedule [i.e. rate change schedule] is filed the Commission shall have authority . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect. . . .

(Emphasis added.)

The above quoted sections of the Act make it clear that the initial rate/changed rate dichotomy is relevant only in the context of the Commission's power to ensure that utility rates are just and reasonable.[26]

Under the statutory scheme, it would appear that initial rates are, in effect, presumed just and reasonable until the Commission determines otherwise.[27] If the Commission finds the initial rate to be unlawful it can order a prospective alteration.[28] When a utility purports to modify or supersede an existing rate schedule, however, the Commission may suspend the operation of the change in order to preserve the status quo. The practical desirability of this added authority is obvious.

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[26] In construing the "virtually identical provisions" of the Natural Gas Act, the Supreme Court Stated:

> The basic power of the Commission is . . . to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by . . . companies and, if they are determined to be unlawful, to remedy them. [This power would] apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented. . . . [A]dd[ed] to this basic power, in the case of a newly changed rate or contract . . . [are] the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the . . . company is lawful.

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 341 (1956).

See FPC v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956).

[27] In making this observation, we do not mean to imply that merely because a rate schedule is in effect that an evidentiary presumption of reasonableness attaches. Indeed, 18 C.F.R. § 35.4 specifically states that "[t]he fact that the Commission permits a rate schedule or any part thereof or any notice of cancellation to become effective shall not constitute approval by the Commission of such rate schedule or part thereof or notice of cancellation."

[28] Federal Power Act § 206, 16 U.S.C. § 824e(a). *See FPC v. Sierra Pac. Power Co.*, 350 U.S. at 353.

When a utility seeks to change the schedule the Act provides the Commission with the authority to preserve the rate for five months in order to give the Commission time to assess the new rate. This supplemental suspension power is not available when considering initial rates since there exists no service status quo to maintain.

Thus "initial rates," although the Act does not specifically use this phrase, would appear to be rates that are set in the first instance by the public utility to cover new services rendered to new customers.[29] A changed rate, on the other hand, would apparently exist any time a newly filed rate schedule purports to modify or supersede a preexisting schedule. Accordingly, under the literal terms of the Act, if a rate schedule purports to change any "rate, charge, classification, or service,"[30] it would presumably constitute a rate change that would be subject to the Commission's suspension and refund authority.[31]

There is no question that the schedule filed by Otter Tail on October 4, 1976, was intended to "supersede, supplement, cancel or otherwise change" the provisions of the rate schedules contained in the Bureau—Otter Tail contract and special municipal agreements. Thus, under our reading of the Act Otter Tail's schedule would clearly constitute a rate change.

[29] *See City of Cleveland, Ohio v. FPC*, 525 F.2d 845, 855 (D.C. Cir. 1976).

[30] Federal Power Act § 205, 16 U.S.C. § 824d(d).

[31] This view is supported by the Commission's regulations. 18 C.F.R. § 35.1(c) reads in pertinent part:

> A rate schedule applicable to a transmission or sale of electric energy which proposes to *supersede, supplement, cancel or otherwise change* any of the provisions of a rate schedule required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate. . . . (Emphasis added).

Fundamental Change in Service.

Otter Tail argues, however, that the schedule filed in this case encompasses a fundamental change in the nature of the service to an existing customer and therefore the new schedule should be characterized as an initial rate. In the prior Commission decision dealing with the wheeling rate to be charged Elbow Lake, Minnesota, the Commission stated that when a utility changes the nature of the service rendered an existing customer, an initial rate schedule filing is appropriate.[32] The Commissioner adhered to this view in the instant case. Since the Commission's interpretation of the Act is entitled to great weight[33] and since this court must assess the rationality of the Commission's decision on the basis of the reasoning given by the Commission, our disposal of Otter Tail's contention requires further treatment.

Otter Tail's argument that its filing should be classified as an initial rate is premised on the factual assertion that the service provided under the newly filed rate is fundamentally different from the service rendered pursuant to the Bureau—Otter Tail contract and special municipal agreements. For

[32] *Otter Tail Power Co.*, (order accepting filing), 50 F.P.C. 1341, 1342-43 (1973). Elbow Lake did not seek review of the Commission's initial-rate classification and the propriety of that decision is not before us.

[33] In enacting the Federal Power Act, Congress charged the Federal Energy Regulatory Commission, not the courts of appeals, with the task of devising methods of enforcing the policy of the Act. *Cf. Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

purposes of classifying the rate schedule, the Commission found no essential differences.[34]

Our review of this factual determination is expressly limited by the congressional directive that "[t]he finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive." Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). *See FPC v. Flordia Power & Light Co.*, 404 U.S. 453, 463 (1972); *Gainesville Utilities Dept. v. Florida Power Corp.*, 402 U.S. 515, 526-29 (1971). While it is true that the factual determination in this case blends with the legal issue regarding whether the rate is an initial rate, that fact does not empower this court to substitute its judgment for the administrative expertise of the Commission. *Cf. E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-57 (1977); *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947).

[34] In assessing Otter Tail's "fundamental change" argument, the Commission, in its order upon reconsideration, observed:

> We find that the distinctions made by Otter Tail between the service provided under the Bureau—Otter Tail Contract and the proposed rate schedule do not warrant treating Otter Tail's filing as an initial rate schedule. Otter Tail points to the fact that the service rendered under the Bureau—Otter Tail Contract is rendered to the Bureau and not the municipalities. In this instance, the Commission will not allow form to triumph over substance. Though Otter Tail's Contract was technically with the Bureau, the municipalities were third-party beneficiaries of that Agreement. Otter Tail wheels power for the Bureau and is compensated by the Bureau for wheeling service. However, the cost of wheeling is recovered by the Bureau in the rates for power charged to the municipalities. Otter Tail's proposed schedule increases the costs of wheeling which will ultimately be borne by the municipalities.
>
> For the purpose of deciding whether or not to treat Otter Tail's filing as an initial rate or a change in rate schedules, it makes little sense to distinguish excess capacity transmission service from firm transmission service; *the basic service being rendered in both instances is transmission service.* Nor is the fact that the new transmission rate is filed in tariff form as opposed to a negotiated contract grounds for treating Otter Tail's filing as an initial rate schedule.

Otter Tail Power Co., (order denying in part and granting in part rehearing, FPC Nos. ER77-5, ER77-6, ER77-7, E-9544 and E-8152) (June 2, 1977), appendix at 355-56 (emphasis added).

We cannot say the Commission irrationally concluded that the new service provided was essentially the same as the old for purposes of determining whether the rate filed was an initial rate. It is true the service now provided is on a firm basis, rather than on an excess capacity commitment. Nevertheless, the type of service is the same originally provided under the Bureau—Otter Tail contract, to-wit: wheeling service.[35]

Elbow Lake

Otter Tail advances a related but more indirect attack on the Commission's decision by claiming that the Commission deviated from its prior decision in the Elbow Lake case without adequate explanation. Thus, Otter Tail contends the Commission's decision to classify the filed rate as a change in rate in the instant case was an arbitrary action outside its scope of authority. We disagree.

The essential difference between Elbow Lake and the intervenors appears to be that when Elbow Lake contracted for wheeling service it was receiving wholesale electric service from Otter Tail. This was power provided, generated and transmitted by Otter Tail to Elbow Lake with no involvement of the Bureau. Under the schedule found to be an initial rate Elbow Lake is now paying Otter Tail only for wheeling electricity purchased from the Bureau. The intervenors, on the other hand, were receiving excess capacity wheeling service and are now receiving firm wheeling service.

[35] Whether there exists a practical difference between "excess capacity" service and "firm" transmission service provided the cities is disputed by the parties. The Commission found that there existed no essential difference since in both instances Otter Tail was wheeling electrical power. For us to say otherwise at least on the present record would require our substitution of judgment in a technical field. The commitment to furnish excess power was dependent on the contract terms. The record indicates that there was no interruption of such service to any of the communities since 1955 based upon Otter Tail's inability to service them.

While we acknowledge the Commission cannot arbitrarily or discriminatorily change its policy,[36] the Commission's action in the instant case does not present such a situation. The explicit terms of the Commission's order refines the distinction between initial and changed rates that was drawn in the Elbow Lake case. Although the dividing line between initial and changed rates that emerged from these two orders might have been more sharply defined, it is for the Commission to draw the line based on its technical expertise. We find the line drawn to be a rational one.[37]

III

In upholding the Commission's changed-rate conclusion, we are likewise compelled to uphold the Commission's decision to suspend the operation of the new schedule and the termination of the old rate. Section 205 of the Act, 16 U.S.C. § 824d (e), clearly gives the Commission unreviewable discretion to

[36] *See Distrigas of Massachusetts Corp. v. FPC*, 517 F.2d 761, 765-66 (1st Cir. 1975); *Public Serv. Comm'n v. FPC*, 511 F.2d 338, 352-55 (D.C. Cir. 1975); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *NLRB v. Tallahassee Coca-Cola Bottling Co.*, 381 F.2d 863, 869 (5th Cir. 1967).

[37] If the Commission finds the line drawn impractical it is free to change it in the future. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267 294-95 (1974); *NLRB v. Wentworth Inst.*, 515 F.2d 550, 554-55 (1st Cir. 1975); K. Davis, Administrative Law Treatise §§ 17.07-.08 (Administrative Law of the Seventies Supp. 1976). The role of the courts is not to rigidify or freeze the administrative process, but rather to ensure that it proceeds on a reasoned basis that is not clearly outside the statutory framework. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947).

suspend rate changes.[38] *See City of Westfield v. FPC*, 551 F.2d 468, 468-69 (1st Cir. 1977); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1351 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). And § 2.4(f) of the relevant regulations states that "[d]uring suspension, the prior existing rate schedule continues in effect and should not be changed during suspension." 18 C.F.R. § 2.4(f). *Cf. Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 153-56 (1960).

IV

We now turn to the final objection raised by Otter Tail. It is asserted that the supplementary agreements of the 17 towns providing firm service with Otter Tail affected the overall rate charged. It is urged that the Commission should not have ordered the continuance of the basic rate under the Bureau contract (1 mill) without a similar continuance of the expired special agreements for firm service of 1.5 mills. The Commission views the special agreements separate from the basic transmission services provided the towns under the Bureau—

[38] Otter Tail argues that even if the Commission had the power to suspend the new schedule, the suspension should be set aside because the Commission did not provide a sufficient "statement in writing of its reasons for such suspension" as required by the Act. Federal Power Act § 205, 16 U.S.C. § 824d(e). The Commission's order states that the rate increase ranges from 183% to 332% for individual customers. The order also recounts allegations by several of the affected municipalities that the new rates fail to reflect Otter Tail's actual costs and are therefore excessive. The Commission concluded that it should suspend the rate increases since Otter Tail had not shown them to be "just and reasonable," and because they "may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful."

While the Commission's conclusion is couched in rather conclusory terms, it is difficult to require a detailed statement of reasons for a suspension when the primary purpose of the suspension is to allow the Commission to determine the validity of the proposed rates. *See* 16 U.S.C. § 824d(e). In light of the "overriding intent of the Congress to give full protective coverage to the consumer," *Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959) (construing suspension provisions of the Natural Gas Act), we find the statement in the December 28, 1976 order adequate.

Otter Tail contract. To the extent that Otter Tail urges that these agreements are interlocking with the Bureau contract, this argument was rejected in a previous decision of this court. *See Otter Tail Power Co. v. FPC*, 536 F.2d 240, 242 n.2 (8th Cir. 1976).

Otter Tail urges here, however, that its argument is not the same as the one previously rejected. It claims "that a municipal rate schedule, to provide the other essential elements for wheeling of Bureau power, is a necessary part of receiving wheeling service, including the provision for payment of 1.5 mills/kWh to Otter Tail, and the cities cannot have or get wheeling of Bureau power from Otter Tail without it." We find the proferred distinction unpersuasive. In our earlier decision we stated as follows:

> Otter Tail additionally asserts that its separate contracts with the towns, which have now expired with respect to Alexandria and Tyler, control in terms of its obligation to transmit power under the USBR—Otter Tail contract. We are in accord with the FPC's determination that the Otter Tail—municipal contracts were not interlocked in a manner that would terminate Otter Tail's responsibility to provide transmission power to the towns through December 31, 1976.

Otter Tail Power Co. v. FPC, 536 F.2d at 242 n.2.

As previously discussed, one effect of the Commission's order was that seven of the special municipal agreements expired prior to December 31, 1976, and the remainder expired on May 31, 1977. Thus, prior to the effective date of the new rate schedule seven of the cities received firm transmission service for 1 mill/kWh while the balance had to pay 2.5 mills/kWh. Otter Tail asserts that this disparity constitutes an abuse of the Commission's discretion and shows that the

1 mill/k/Wh rate is unreasonably low. Again we must disagree.

The alleged disparity results not from the Commission's action, but rather from the varying termination dates contained in the municipal agreements which Otter Tail voluntarily entered into. In an analogous situation the Supreme Court stated:

> [W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. *Arkansas Natural Gas Co. v. Railroad Comm'n*, 261 U.S. 379. In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed "is necessary in the public interest." When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956).

In conclusion, we agree with Otter Tail that the new rate schedule under the statute must be compensatory. However, this issue is not before us; we can only assume at this writing that the hearings have been or will be soon conducted and the Commission will make its determination as to a just and reasonable rate affecting all of the municipalities to be served by Otter Tail.

We fail to find error in the Commission's treatment of the rates as not being initial rates and in holding that they constitute a change in rates under the statutes and regulations.

The Commission's orders under review are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

CONTINUATION OF APPENDIX A

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1977

No. 77-1582

OTTER TAIL POWER COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ALEXANDRIA, BARNESVILLE, BENSON, DETROIT LAKES, HENNING, LAKE PARK, ORTONVILLE, and WARREN, MINNESOTA and BIG STONE CITY, SOUTH DAKOTA,
Intervenor-Respondents.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

This Cause came on to be heard on petition for review of order of the Federal Energy Regulatory Commission, appendix and briefs filed by the respective parties with oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the decision of the Commission in this cause be and the same is hereby affirmed in accordance with the opinion of this Court.

September 8, 1978

APPENDIX B

Federal Power Act, §§ 205, 206
16 U.S.C. 824d, 824e

§824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rates or charges that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge,

classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall

go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.

§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852.

APPENDIX C

Federal Power Commission Regulations Under the Federal Power Act, §§ 35.1(b) and (c) 35.12, 35.13, 35.15, 36.2(e), (f) and (g), and 131.53, 18 C.F.R. 35.1(b) and (c) 35.12, 35.13, 35.15, 36.2(e), (f) and (g), and 131.53

(Revised as of April 1, 1977)

§35.1 Application; obligation to file rate schedules.

(b) A rate schedule applicable to a transmission or sale of electric energy, other than that which proposes to supersede, supplement, cancel or otherwise change the provisions of a rate schedule required to be on file with this Commission, shall be filed as an initial rate in accordance with § 35.12.

(c) A rate schedule applicable to a transmission or sale of electric energy which proposes to supersede, supplement, cancel or otherwise change any of the provisions of a rate schedule required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except Notes of Cancellation or Termination which shall be filed as a change in accordance with § 35.15.

DOCUMENTS TO BE SUBMITTED WITH A FILING

§35.12 Filing of initial rate schedules.

(a) The letter of a public utility transmitting to the commission for filing an initial rate schedule shall list the documents submitted with the filing; give the date on which the service under that schedule is expected to commence; state the names and addresses of those to whom the rate schedule has been mailed; contain a brief description of the kinds of

services to be furnished at the rates specified therein; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

(b) In addition, the following material shall be submitted:

(1) Estimates of the transactions and revenues under an initial rate schedule. This shall include estimates, by months and for the year, of the quantities of services to be rendered and of the revenues to be derived therefrom during the 12 months immediately following the month in which those services will commence. Such estimates should be subdivided by classes of service, customers, and delivery points and shall show all billing determinants, e.g., kw, kwh, fuel adjustment, power factor adjustment. These estimates will not be required where they cannot be made with relative accuracy as, for example, in cases of interconnection arrangements containing schedules of rates for emergency energy spinning reserve or economy energy or in cases of coordination and integration of hydroelectric generating resources whose output cannot be predicted quantitatively due to water conditions.

(2) (i) Basis of the rate or charge proposed in an initial rate schedule and an explanation of how the proposed rate or charge was derived. For example, is it a standard rate of the filing public utility; is it a special rate arrived at through negotiations and, if so, were unusual customer requirements or competitive factors involved; and is it designed to produce

a return substantially equal to the filing public utility's overall rate of return or is it essentially an increment cost plus a share of the savings rate? Were special cost of service studies prepared in connection with the derivation of the rate?

(ii) A summary statement of all cost (whether fully distributed, incremental or other) computations involved in arriving at the derivation of the level of the rate, in sufficient detail to justify the rate, shall be submitted with the filing, except that if the filing includes nothing more than service to one or more added customers under an established rate of the utility for a particular class of service, such summary statement of cost computations is not required. In all cases, the Secretary is authorized to require the submission of the complete cost studies as part of the filing and each filing public utility shall submit the same upon request by the Secretary in such form as he shall direct.

(3) A comparison of the proposed initial rate with other rates of the filing public utility for similar wholesale for resale and transmission services.

(4) If any facilities are installed or modified in order to supply the service to be furnished under the proposed rate schedule, the filing public utility shall show on an appropriate available map (or sketch) and single line diagram the additions or changes to be made.

(5) In support of the design of the proposed rate, the filing public utility shall submit the same material required to be furnished pursuant to § 35.13(b)(4)(iii) Statement P. In addition to the summary cost analysis required by Statement P, the public utility shall also submit a complete explanation as to the method used in arriving at the cost of service allocated to the sales and service for which the rate or charge is proposed, and showing the principal determinants used for

allocation purposes. In connection therewith, the following data should be submitted:

(i) In the event the filing public utility considers certain special facilities as being devoted entirely to the service involved, it shall show the cost of service related to such special facilities.

(ii) Computations showing the energy responsibility of the service, based upon considerations of energy sales under the proposed rate schedule and the kWh delivered from the filing public utility's supply system.

(iii) Computations showing the demand responsibility of the service, and explaining the considerations upon which such responsibility was determined (e.g., coincident or non-coincident peak demands, etc.).

§ 35.13 Filing of changes in rate schedules.

(a) The letter of a public utility transmitting to the Commission for filing a rate schedule, or part thereof, to supersede, supplement or otherwise change the provisions of a rate schedule required to be on file with the Commission, shall list the documents submitted with the filing; gave the date on which the filing public utility proposes to make the changes in service and or rate, charge, classification, rule, regulation, practice or contract effective; state the names and addresses of those to whom copies of the rate schedule has been mailed; include a brief description of the proposed changes in service and/or rate, charges, etc.; state the reasons for the proposed changes; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule

filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

(b) In addition the following material shall be submitted:

(1) A statement comparing sales and services and revenues therefrom, by months and for the year, under both the rate schedule proposed to be superseded or supplemented and the proposed changed rate schedule, each applied to the transactions for the 12 months immediately preceding and to the 12 months immediately succeeding the date on which the new rate schedule is to become effective. Such comparisons should be made for each class of service, for each customer, and for each delivery point. The billing quantities involved in the computation of the charges should also be shown.

(2) A comparison of the proposed rate with other rates of the filing public utility for similar wholesale for resale and transmission services.

(3) If any facilities are installed or modified in order to supply the service to be furnished under the proposed rate schedule, the filing public utility shall show on an appropriate available map (or sketch) and single line diagram the additions or changes to be made.

(4) (i) Except as provided in subdivision (ii) of this subparagraph, if the rate schedule provides for an increased rate, then 60 days prior to the date that such changed rate is proposed to become effective the filing public utility shall submit a statement showing its cost of the service to be supplied under the new rate schedule according to supporting statements A through O as described below. Simultaneously, the public utility shall submit the material on sales and revenues described in paragraph (a) of this section and, unless the rate schedule containing the proposed increased rate is likewise

simultaneously filed, a summary statement of such proposed increased rate: Provided, however, That the submittal of such summary statement of the rate schedule shall not be in lieu of the rate schedule as required to be filed with the Commission pursuant to the regulations in this Part.

(ii) Statements A through O need not be filed where a proposed rate increase amounts to less than $50,000 annually. Increases of less than $50,000 annually shall, however, be accompanied by the information specified in § 35.12(b) (2) and (5), except where the increase results from changes such as an increase in the number of delivery points or a change in delivery-voltage.

(iii) The statement of the cost of service should contain unadjusted system costs for the most recent twelve consecutive months for which actual data are available (Period I) including return, taxes, depreciation, and operating expenses, and an allocation of such costs of the service rendered: Provided, however, that the last day of the 12 months of actual experience shall not be more than seven months prior to the date of tender for filing of the proposed notice change in rates and charges. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of the public utility do, in fact, set forth the result shown by such books. Following is a description of statements A through P required to be filed pursuant to this subparagraph. In addition, the public utility shall file statements A through P together with related work papers based on estimates for any twelve consecutive months beginning after the end of Period I but no later than the date the rates are proposed to become effective (Period II). Full

explanation of the bases of each of the estimated figures shall be included, Period II shall be the "test period". The filing requirements of Period II herein are voluntary for companies with applications for increases less than one million dollars.

(Description of Statements A through P omitted.)

(iv) [Reserved]

(v) To the extent that testimony and exhibits required to be filed pursuant to subparagraph (5) of this paragraph duplicate information required to be submitted pursuant to this subparagraph, such information need only be submitted with the testimony and exhibits filed pursuant to subparagraph (5) of this paragraph.

(5) (i) A utility filing for an increase in rates and charges shall be prepared to go forward at a hearing on reasonable notice on the data which have been submitted and sustain the burden of proof, imposed by the Federal Power Act, of establishing that its proposed charges are just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act. The Commission is desirous of avoiding delay in processing rate filings. To this end, if the rate schedule provides for an increase in rate which exceeds $50,000 in revenues for the test period, the filing utility shall submit with its rate increase filing 60 days prior to the proposed effective date of such increased rates, testimony and exhibits of such composition, scope and format that they would serve as the company's case-in-chief in the event the matter is set for hearing. In addition to whatever material the utility chooses to submit as part of its case, except for increases resulting from changes made in fuel clauses and increases of rates comprising an integral part of coordination and interchange arrangements in the nature of power pooling transactions, the exhibits shall include full cost of ser-

vice data, as identified in subparagraph (4) (iii) of this paragraph, statements A through O, and the accompanying testimony should include an explanation of these exhibits.

(c) If a rate schedule required to be on file with this Commission is not required to be supported by cost of service data as set forth in this section but such data may be needed for Commission analysis, these regulations contemplate that each filing public utility may be required, by letter of the Secretary, to submit specified cost data.

(d) Filing public utilities in completing the supporting cost of service data herein required should be guided by applicable Commission precedents and policy statements considered in the light of their respective operating conditions and sales and services subject to this Commission's regulatory jurisdiction.

§ 35.15 Notices of cancellation or termination.

When a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, each party required to file the schedule shall notify the Commission of the proposed cancellation or termination on the form indicated in § 131.53 of this chapter at least thirty days but not more than ninety days prior to the date such cancellation or termination is proposed to take effect. A copy of such notice to the Commission shall be duly posted. With such notice each filing party shall submit a statement giving the reasons for the proposed cancellation or termination, and a list of the affected purchasers to whom the notice has been mailed. For good cause shown, the Commission may by order provide that the notice of cancellation or termination shall be effective as of a date prior to the date of filing or prior to the date the filing would become effective in accordance with these rules.

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

* * *

(e) Nominal rate schedule filings voluntarily filed other than those involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulation not affecting billings, extensions of terms of contracts or continuation of service, cancellation of rate schedules where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting service, rates or billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings voluntarily filed $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving rate increases (computed on an annual basis) in excess of charges for the 12-month period preceding the proposed effective date thereof, as follows:

(1) Nominal rate increases:

(i) Schedule changes involving increases in rates totaling less than $5,000 and 1 percent of the total charges to the persons to be affected thereby $100

(ii) Schedule changes involving increases in rates totaling less than $5,000 but not subject to the filing fee provided in subdivision (i) of this subparagraph and those involving increases in rates of $5,000 or more but not less than $50,000 ..... $500

(2) Rate increases other than those covered under subparagraph (1) of this paragraph:

(i) One percent of the amount of such increases up to but not exceeding $1 million;

(ii) $10,000 plus one-half percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

(iii) $55,000 plus one quarter percent of the amount of such increases in excess of $10 million.

§ 135.53 Notice of cancellation.

(See §§ 35.1-35.21 of this chapter.)

[An original and one conformed copy to be submitted]

Notice is hereby given that effective the .... day of ..... 19 .., Rate Schedule F.P.C. No. ...., effective date ..... and filed with the Federal Power Commission by ..... (Name of public utility filing rate schedule) is to be cancelled.

Notice of the proposed cancellation has been served upon the following:

.....

.....

.....

.....

(Name of public utility)

By .....

.....

(Title)

Dated ....., 19 ..